No. 83-365

In the Supreme Court of the United States

OCTOBER TERM, 1983

IN RE DAVID PELTON MOORE, BY
MICHAEL R.P. MOORE AND
BARBARA R.P. MOORE, PETITIONER

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

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Petitioners seek a writ of mandamus to compel the United States Court of Appeals for the Federal Circuit (1) to re-enter its order denying rehearing so that petitioners can file a timely petition for certiorari from the court's judgment, and (2) to provide additional reasons to support its judgment. Petitioners have failed to satisfy the standards for the granting of an extraordinary writ.

1. Petitioners' decedent brought this patent infringement suit against the United States, seeking compensation for the allegedly unauthorized use of the invention claimed in his United States Reissue Patent No. 26,108, entitled "Solid Explosive Composition and Method of Preparation Employing Vulcanized Rubber and a Solid Inorganic Oxidizing Salt." The plaintiff's contention was that certain rocket and missile propellants used by or for the United States, and the processes used in making them, infringed his patent. The

trial judge for the Court of Claims issued a 14-page opinion recommending dismissal of the suit, on the ground that the alleged infingement had not been proven. 211 U.S.P.Q. 800 (1981). This recommended decision was subsequently adopted by the then reconstituted United States Claims Court (see Pet. App. 2a n.*).

The court of appeals affirmed. Although the court did not "adopt[]" the trial court's opinion, it "agree[d] generally with its substance and the reasons it gives for the conclusion" (Pet. App. 2a). Petitioners, who were substituted as appellants after plaintiff's death, filed a timely petition for rehearing, dated January 21, 1983. That petition was denied on February 9, 1983 (Pet. App. 3a), and the denial was duly entered on the public record on that date.

On May 18, 1983, petitioners filed a motion to reenter judgment in the court below. The basis for the motion was that "[a] copy of the denial of the Petition For Rehearing * * * was not received by counsel for appellant[s] until May 16, at which time a Petition For Writ Of Certiorari could not be timely filed with the Supreme Court" (Motion to Reenter at 1). In an affidavit attached to the motion, counsel for petitioners stated: 'The denial of the Petition For Rehearing * * * dated February 9, 1983, was first received in this office on May 16, 1983" (Affidavit at 1 para. 3).[1]

On June 6, 1983, the court of appeals denied the motion to reenter judgment (Pet. App. 4a), and on August 28 —some 83 days later—petitioners filed a petition for mandamus in this Court.

2. Petitioners' first contention is that the court of appeals should be compelled to reenter judgment in order to accord them an opportunity to file a petition for a writ of

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[1] We have lodged a copy of this motion and affidavit with the Clerk of this Court.

certiorari, since the asserted failure of the clerk of the court of appeals to send them timely notice of the denial of rehearing effectively deprived them of their original opportunity to do so. However, 28 U.S.C. 2101(c) provides that the time for filing a petition for a writ of certiorari runs from "the entry of [a] judgment or decree." Supreme Court Rule 20.4 further provides that the time for filing runs from the "date of the denial of rehearing" in cases in which a timely petition for rehearing is denied by the lower court. Neither the statute nor the rule calculates the running of time from *notice* of the denial of rehearing. Ordinarily, reentry of judgment by a court of appeals does not enlarge the time for filing of a petition under 28 U.S.C. 2101(c) (*FTC* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211 (1952)), and the circumstances of this case do not compel an exception. Cf. *Durham* v. *United States*, 401 U.S. 481, 481-482 (1971); *Scofield* v. *NLRB*, 394 U.S. 423, 427 (1969).[2]

There is no reason why, with due diligence, petitioners' counsel could not have discovered the denial of their petition for rehearing in time to seek certiorari. As noted above, the denial of rehearing was entered on the court's public docket on February 9, 1983. Moreover, petitions for rehearing in the Court of Appeals for the Federal Circuit and its predecessor courts have generally been decided quickly, and an attorney familiar with practice before that court should not allow over four months to pass before inquiring about the status of a petition for rehearing, as happened in

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[2]See also *Hill* v. *Hawes*, 320 U.S. 520 (1944). In *Hill*, the Court held that a district court can extend the time for taking an appeal by reentering the judgment, where the losing party's opportunity to appeal would otherwise lapse before he had received notice of an adverse decision. The result in *Hill* was overturned by a 1946 amendment to the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 77(d) and the advisory committee notes thereto.

this case.[3] By contrast, in *Durham*, the petitioner had inquired about the status of his petition for rehearing and had been specifically informed that the court would notify him "as soon as the court acted." Several months later, he inquired again, only to be informed that his petition for rehearing had been denied six months before. 401 U.S. at 481-482. See also *Hensley* v. *Chesapeake & O. Ry.*, 651 F.2d 226, 229-231 (4th Cir. 1981). Petitioners have not cited any similar circumstances or other reasons suggesting why they should be granted special relief. Their claim thus reduces to an argument for a per se extension of time to file a petition for certiorari in any case in which timely notice is not provided of a denial of rehearing, whether or not due diligence was exercised in seeking notice. The court of appeals' denial of petitioners' motion for reentry of judgment was not, therefore, an abuse of discretion warranting issuance of a writ of mandamus.

Moreover, petitioners' claim to mandamus relief is weakened by their 83-day delay before filing a mandamus petition with this Court. Cf. *Hill* v. *Hawes*, 320 U.S. 520, 521 (1944) (relief sought seven days after notice of appeal time had run); *Durham*, 401 U.S. at 481-482 (certiorari petition filed three weeks after untimely receipt of order denying rehearing). Although there are no strict time limits on requests for extraordinary relief, the Court, in exercising its discretion, should consider whether the petitioner has moved expeditiously. See *United States* v. *Braasch*, 542 F.2d 442, 444 (7th Cir. 1976).

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[3]We do not suggest that attorneys must deluge the courts of appeals with periodic inquiries about the status of petitions for rehearing in order to protect against the rare instance in which the clerk of the court may fail to provide notice. However, it is reasonable to expect an attorney to make inquiry after months have elapsed, in view of the time limit imposed by 28 U.S.C. 2101(c), which is jurisdictional. See *Department of Banking* v. *Pink*, 317 U.S. 264 (1942).

3. Petitioners' objection to the adequacy of the court of appeals' opinion is premature. If afforded an opportunity to file a petition for certiorari, they can seek to have the judgment vacated and remanded for fuller explication at that time. In any event, mandamus is not available to compel a court of appeals to write a more expansive opinion. The court here expressly adopted the substance and reasons of the trial court's opinion, although it stopped short of adopting its language. The court of appeals thereby apprised counsel and his clients of the basis for its action.

It is therefore respectfully submitted that the petition for a writ of mandamus should be denied.

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